1957

Product Warranty Liability

Lee E. Skeel

Product Warranty Liability

*Judge Lee E. Skeel**

MUCH HAS BEEN SAID ABOUT the liability of a manufacturer to a sub-purchaser for injuries caused by his products. Actions against manufacturers, if based on the theory of negligence, offer obvious difficulties of proof. Actions based on implied or even express warranties often are defeated by lack of contract privity.

There is however, a widespread misconception of the true nature of warranty. This misconception must result in unjust decisions in some cases. It therefore is desirable that the true nature of warranty be analyzed. Such analysis may disclose the proper relation of an express or implied warranty to the injury suffered from defective or otherwise dangerous manufactured products.

Let us take, for this purpose, an hypothetical hair-curling "home treatment" product. Let us suppose injury suffered by a user who relied on the warranties *advertised* by the product manufacturer.

So many difficulties are inherent in the theory of implied warranty that it seems wise to consider first the possibilities of express warranty. After all, many products today are widely advertised by the manufacturer. Is such advertising equivalent to an express warranty? If it is, much of the problem may resolve itself.

For the sake of simplicity, this paper will omit discussion of proof of actual negligence, merely touch on proof of implied warranty, and concentrate on actual warranty in advertising and labeling of products.

The usual petition will allege, in this respect, that the plaintiff was induced to purchase a product of the defendant's manufacture known as ". . . . Home Permanent" as a result of the defendant's representations made in advertisements seeking to induce ultimate consumers to purchase and use its products, and

---

* Ohio Court of Appeals; President, Cleveland-Marshall Law School; etc.

[*Editors' Note:* Judge Skeel kindly consented, at the request of the Editors, to write this discussion of his court's decision in a case closely similar to the hypothetical problem here analyzed—a decision overruling a demurrer to the theory here adopted, in, Rogers v. Toni Home Permanent Co., Ct. Appeals of Ohio, Cuyahoga County, 8th Distr., dated Jan. 16, 1957.]

particularly ". . . . Home Permanent." It often also is alleged that the said product is a drug as defined by the State's statutes,[1] intended for use in the self-administration of a permanent hair wave. The plaintiff usually alleges that after first testing her hair, as directed by the defendant in printed instructions furnished by the defendant for the safe use of its product, she proceeded, by following explicitly such instructions, to administer to herself a "permanent wave." In doing so, she alleges, she used exclusively the materials furnished by the defendant, which materials were labeled "Very Gentle," and by reason of the deleterious and harmful character of such materials furnished by the defendant, known as ". . . . Home Permanent," when they were applied to the hair of the plaintiff, they caused her hair to "assume a cotton-like texture and became gummy; that her hair refused to dry and that when the curlers furnished by the defendant were attempted to be removed, her hair fell off to within one half inch of her scalp."

It is then alleged that the defendant induced the plaintiff, by express representation in advertisements directed to the attention of the public and particularly to ultimate consumers, to purchase its product from distributors or retailers, said representations being to the effect that she could use the ". . . . Home Permanent" for the purpose intended and in the manner directed by the defendant, with complete safety to her person. There often are other allegations of other theories of action supplementing and in support of the foregoing allegations of fact. The plaintiff then usually prays damages for the injuries sustained as a result of applying the ". . . . Home Permanent" as directed by the defendant.

In addition, implied warranty also is pleaded as a third theory.

The third cause of action adopts all of the facts set forth in the first (negligence) and second (actual warranty) causes of action, and alleges a breach of an implied warranty of its product imposed by law as to its fitness for use and merchantability in the following respects:[2]

> "1. That the Plaintiff was a third-party beneficiary, as the intended consumer, of any contracts entered into by the Defendant for the sale of its merchandise to the Plaintiff.

---

[1] E.g., Ohio's Rev. Code, Sec. 3715.01.

[2] See, for various other forms of allegations, works on Forms of Pleading.

"2. That there was an implied warranty which ran with the article from the Defendant to the consumer, the Plaintiff, that the article was fit for the use for which it was designed, compounded and intended.

"3. That the Defendant, in placing its product upon the market, intended that it eventually be sold to Plaintiff, or other like consumers, and impliedly warranted the product to Plaintiff, or other like consumers.

"4. That Defendant was conscious of the fact that Plaintiff, or others similarly induced by Defendant's advertising, would be the ultimate purchasers, and knowing and intending that Plaintiff and other purchasers be those the Defendant looked to for income, the Defendant impliedly contracted with them, and thus, impliedly warranted its product to them.

"5. That an implied warranty by the Defendant to the *Plaintiff arose as a matter of public policy, which public* policy is evidenced by the Pure Food and Drug Act of the State of . . .,[3] which Act places manufacturers and sellers of foods and drugs in a category separate and distinct from that of the manufacturers and sellers of articles other than foods and drugs."

The plaintiff then usually alleges facts constituting a breach of such implied warranty and claims damages as a specific result of such breach.

It is evident, in many denials of such requested relief that the sole basis upon which the court sustains the defendants' demurrers is on the ground that there is no privity between the *plaintiff as ultimate consumer and the defendant as manufacturer* of the product used by the plaintiff to her alleged injury, the plaintiff having admittedly purchased defendant's product from an independent retailer.

The facts pleaded in plaintiff's petition as above set forth, for the purposes of the defendant's demurrer, must be considered as true.

It is a matter of common knowledge that the method of merchandising products manufactured for use and consumption by the individual has completely changed since the formative period of the law of "Sales." Marketing has changed from the period when the "common" artisan sold the products of his own manufacture directly to the consumer, to the time of expansion of markets through the direct efforts of middlemen and retailers, who created the markets and served the consumer's needs. To-

[3] Ohio's Pure Food and Drug Act is typical of those of many States.

day, competing manufacturers, by direct advertising create, by their own acts, the consumer market for their products. The middleman or retailer now has become a delivery station to make such goods available to the consumer. In the transition, even the packaging is now done by the manufacturer. Today the product is usually delivered to the consumer in sealed cans, boxes or wrapping as prepared by the manufacturer. The Super Market exemplifies the process where the customer picks what he wants from the shelves of the Super Market without even the presence of a sales person, having been induced in his selection by the manufacturer's advertisement, and the first time he has any contact with the retailer is in paying for his selections at the cashier's desk.

The commonplace facts in this case, as described above, fit completely into the foregoing pattern. The plaintiff demanded of a retailer a ". . . . Home Permanent," which was received in a sealed bottle packaged by the defendant, with which was also received the defendant's printed directions for the "safe" use of its product. The purchase was, as alleged by the petition, induced by the defendant's representations.

By the early law, in transactions involving the sale of personal property, the obligation imposed upon the seller was only to see to it that the goods agreed upon were made available to the buyer. So far as their condition was concerned (except where actual fraud was practiced), the law placed full responsibility on the buyer to determine that question for himself, unless he requested a representation as to their quality, which, if given, was considered a warranty and as such was collateral to and not part of the sales agreement. *Caveat Emptor* (Let the Buyer Beware) was the basic theory of the law. Where a warranty was demanded, if the transaction was a sale of identified property, the property in the goods passed irrevocably to the buyer, even though the warranty was untrue. The only action afforded the buyer was an action in tort for damages for breach of the collateral promise or representation. If the sale was of unspecified goods, the warranty (collateral in nature or legal effect), was treated as a condition which did not survive the acceptance of the goods.[4]

The action for breach of warranty was in its origin a pure action in tort. The gradual change of the character of the action

[4] 1 Williston on Sales, pars. 195, 196 (rev. ed., 1948).

to one in contract has come about because promises inducing the sales, such as descriptive representations, were included in the terms of the agreement. The form in which the inducement was made did not change the legal meaning of "warranty" nor the character of the obligation thus created, nor the manner or form of the action in which a breach of warranty could be pursued. A warranty is an obligation imposed by law, either because of a representation which induces the sale or a promise within the terms of the agreement of sale, and a breach of this obligation imposed by law may be pursued either in an action in tort or in contract.[5]

Williston, in his treatise on Sales,[6] after stating that there can be no doubt but that today the obligation of warranty is conceived of as contractual, and that "there can be no doubt but that the seller may expressly promise to be answerable for some alleged quality of the articles sold, or that if he makes a promise for good consideration, he enters into a contract" then goes on to say that:

> "This, however, does not either upon authority or reason exhaust the possibilities of express warranties. It should not be the law, and by the weight of modern authority, it is not the law that a seller who by positive affirmation induces a buyer to enter into a bargain can escape from liability by convincing the court that his affirmation was not an offer to contract. A positive representation of fact is enough to render him liable. The distinction between warranty and representation which is important in some branches of the law is not appropriate here. *The representation of fact which induces a bargain is a warranty.* (Italics added.)
>
> "As an actual agreement to contract is not essential, the obligation of the seller in such a case is one imposed by law as distinguished from one voluntarily assumed. It may be called an obligation either on a quasi-contract or a quasi-tort, because remedies appropriate to contract and also to tort have been applicable. That this is the character of the seller's obligation was recognized by Blackstone, and that this point of view has been lost sight of by many courts is no doubt due to the fact that assumpsit became so generally the remedy for the enforcement of a warranty. But even recently an action of tort for warranty has been held by distinguished courts to lie irrespective of any fraud on the part of the seller or knowledge on his part that the representations constitut-

---

[5] For other definitions see Black's Law Dictionary (4th ed., 1951); and, "Words And Phrases."

[6] 1 Williston on Sales, 506 (par. 197) (rev. ed., 1948).

ing the warranty were untrue. These authorities should serve to show that the elements of a warranty are broader than those of a contract."

Note 16, under this paragraph in Williston, in attempting to clarify what Blackstone has had to say on this subject, states that:

"Blackstone places his treatment of warranty under the head of contracts which are implied by law: 'Which are such as reason and justice dictate, and which therefore the law presumes that every man has contracted to perform; and, upon this presumption, makes him answerable to such persons, as suffer by his nonperformance.' In the last class of contracts 'implied by reason and construction of law,' Blackstone includes warranties: 'Also, if he that selleth anything doth upon the sale warrant it to be good, the law annexes a tacit contract to this warranty, that if it be not so, he shall make compensation to the buyer; else it is an injury to good faith, for which an action on the case will lie to recover damages.' . . ."

The legal character of an express warranty as an obligation imposed by law is clearly demonstrated as not necessarily contractual when considering the parol evidence rule. The subject is treated in cases where the sale was induced by verbal representations or by the use of samples, and where the contract is thereafter reduced to writing and no mention of the representations or samples that induced the sale is made, in the writing.[7]

In concluding consideration of this question, Williston says that:

"But if a written contract for goods is procured by representing that the goods described in the writing are like a sample which is exhibited, it seems that parol evidence should be admitted to prove these representations and that the seller should be liable as warranting the truth of them. They are not part of the contract, but the law should impose irrespective of the intention of the parties an obligation upon one who induces a bargain by making such statements." [8]

The law is clear that an intent to warrant is not an essential element in establishing a representation as constituting a warranty. Any representation that has the effect of inducing the sale comes within the foregoing definition. A rule of law that would distinguish between the rights of the parties to a sale where the representation that induces the sale is collateral to and not

[7] Ibid., p. 554 (par. 215).
[8] Ibid., p. 558.

included within the terms of the agreement, written or otherwise, and a case where the same representation is a part of and included within the terms of the sales agreement, certainly must lead to utter confusion and is not to be recommended.

In an action between the buyer and seller, the courts of Ohio have held that representations inducing the sale, but not contained in a written contract, constitute a warranty enforceable against the seller.[9] In *Meyer v. Packard Cleveland Motor Co.*,[10] paragraphs 1 and 2 of the syllabus state that:

> "1. Where one is engaged in the manufacture and sale of motor trucks, and the rebuilding of its used trucks, newspaper ads or circulars touching rebuilt trucks, authorized and published by such motor company to the general trade, are competent evidence in behalf of the purchaser of any such truck, who knows of such ad and relies upon the same, unless it appear from the special contract signed by the parties touching such sale that such special contract withdrew or altered the representations made in such general ad.
>
> "2. The language of a written order or contract of sale—'All promises, verbal agreements, or agreements of any kind pertaining to this purchase not specified herein, are hereby expressly waived'—does not exempt such contract from the force and effect of such general advertisement touching the character and quality of a truck in process of rebuilding when such contract was executed."

The fact that a representation inducing a sale of personal property need not be a promise within the terms of a sale to constitute a warranty is further exemplified by a consideration of statements made previous to the bargain. Williston, in considering this question, comes to the conclusion that such statements, if relied on to bring about or to consummate a sale of personal property, constitute an express warranty.[11]

The importance to the buyer of the right to bring an action for breach of warranty, rather than an action for negligence in the process of manufacture or in the use and selection of materials used in the manufacture of the goods, must be kept clearly in mind. If the buyer is compelled to contest the question of negligence in the process of manufacture with the manufacturer, he will be at a great disadvantage unless the circumstances are

---

[9] Meyer v. Packard Cleveland Motor Co., 106 O. S. 328, 140 N. E. 118, 28 A. L. R. 986 (1922).

[10] Ibid.

[11] 1 Williston on Sales, pars. 209, 210 (rev. ed., 1948).

such as to justify the doctrine of res ipsa loquitur. In the very nature of things, evidence of negligence in the use of materials or process of manufacture or inspection is within the exclusive control of the manufacturer. In such case, the plaintiff has the burden of showing fault on the part of the manufacturer—an extremely difficult task.

The tort action permitted was (and in fact the only action for breach of warranty possible under the early common law was) not one requiring the plaintiff to establish fault in the process of manufacture or in the use of materials as the basis of recovery. Here the tort was concerned with the truth of the representation, regardless of whether or not the seller knew his representation to be untrue or that his product was negligently made. The fact that the seller's representations were false, which resulted in injury to the buyer in that he did not get the goods the seller represented or pretended to sell, was clearly the basis of the tort action. Damages, both direct and consequential, were recoverable for the breach of the untrue representation. The action was in the nature of one for misrepresentation, without the necessity of proving intent to defraud or that the misstatement of fact was knowingly made.

So we conclude that the obligation of "warranty" in the sale of goods is one imposed by law, and one that need not necessarily be based on contract. Then the remaining question is whether the ultimate purchaser, having been induced to purchase the goods by representations made by the manufacturer, has a cause of action against the manufacturer, where the purchase was made from an independent middleman or retailer whose part in the transaction was limited to passing the goods on from the manufacturer to the consumer, the article being selected by the buyer without the middleman or retailer making representations of any kind. It must be admitted that the earlier cases, with a few exceptions based on the character of the goods, held that such a cause of action did not exist, because of the absence of privity between the manufacturer and the ultimate consumer. These cases completely overlook the fact that in many of them the obligation created by a warranty is not necessarily contractual in nature, but is one imposed by law.

The requirement of privity had its beginning in, and is still founded on court decisions. At the time the rule was established, the possibility of a warranty being a part of the sales agreement was recognized. That is, it was recognized that it was not neces-

sarily collateral in legal effect. The common law action in assumpsit was then permitted to replace the tort proceeding in trespass on the case. These early cases gave no indications in fact that the manufacturer or creator of the goods made any representations to induce the ultimate consumer to buy his product. The selling was done by the retailer, and so, even though the doctrine of privity was not an essential element in dealing with a warranty imposed by law, its injection into such cases was in accord with the facts. Williston, in an article,[12] said that:

> "If a man makes a statement in regard to a matter upon which his hearers may reasonably suppose he has the means of information, and that he is speaking with full knowledge, and the statement is made as a part of a business transaction, or to induce action from which the speaker expects to gain an advantage, he should be held liable for his misstatement."

The foregoing quotation will be found in an article by, and is adopted by, another leading writer, Professor James H. Spruill, Jr.[13] He then proceeds to say,[14] that:

> " 'What is important is that statements are made by one who professes a reasonable certainty of knowledge, or whose position makes accurate information peculiarly available to him. Not only parties to the contract itself, but those interested in and closely connected with the subject matter who, because of such connection, are in a position to furnish accurate information, or who purport to impart it, may well be held to answer here for even innocent information.' 'There are situations in which action is commonly taken in business negotiations upon the assumed existence of certain facts. Business proceeds not upon the assumption that representations are merely honestly and cautiously made, but that they are true.' As applied to the problem under consideration, this principle might be stated thus: One in, or apparently in, a position to know, who, actuated by self-interest, makes a representation intended to induce, and reasonably inducing another to purchase or to use goods, is an insurer of the truth of the matter so represented.
>
> "If this analysis be followed and representation be regarded as warranty, then privity of contract will be seen in a different perspective. It now becomes significant only insofar as it evidences a reasonable basis for reliance. And here, in the principle of reliance, one can, perhaps, see the reason

---

[12] Williston, Liability For Honest Misrepresentation, 24 Harv. L. R. 415, 437 (1911).

[13] Spruill, Privity of Contract As a Requisite for Recovery On Warranty, 19 No. Car. L. R. 551 (1941).

[14] Ibid., n. 13, at p. 557.

> for the conventional rule that recovery on warranty may be had only where there is privity of contract. For, while warranty is not contract, it would seem that until recently it was only in situations where contract existed that one would find that reasonable reliance which serves as the basis for liability without fault. This statement is, of course, subject to some exceptions; but the law has a tendency to fit the average and ignore the exceptional situation."

He then goes on to say that: [15]

> "The Sale of Goods Act and the Uniform Sales Act were drafted as codifications of the common law. For this reason they reflect the production and merchandising pattern of the past century rather than the present. They make no provision for warranty for the benefit of a subvendee; but it would seem clear that neither act was intended to exclude such liability. And where one is seeking to extend liability on warranty for the benefit of a subvendee or donee, his great difficulty is not the Sales Act but the fact that such relief has been so frequently denied as to make the rule as to the necessity of privity seem almost axiomatic. But, despite this obstacle, the law is on the move."

The cases dealing with the requirement of privity in an action for breach of warranty (express or implied) are in hopeless conflict, with a growing tendency (for one reason or another) to sidestep or ignore such requirement. The reason for permitting recovery against the manufacturer by the sub-purchaser, when such action is permitted, is based in some jurisdictions on the character of the product. If the product is food, a drug, or something of an inherently dangerous character, recovery is permitted without privity, on grounds of public policy, while the purchaser of other chattels is not permitted such right. These distinctions are hard to justify. What is in fact dangerous is highly problematical, depending on many considerations and surrounding circumstances. In some jurisdictions the character of the injury is the distinguishing feature. Here actions for personal injury are permitted while actions for property damage are denied without privity. It is hard to see why, on the grounds of public policy, a slight personal injury should come within the exceptions, when a fire causing the destruction of one's home caused by a defective electric blanket would not. And finally, the character of the action has been held to make the difference. If the action is for breach of warranty, without privity, recovery in some jurisdictions is denied. If it be based on negligence, that is

---

[15] Ibid., n. 13, at p. 558.

on a showing of fault, recovery by the ultimate consumer against the manufacturer is now permitted in most jurisdictions. In the case of *MacPherson v. Buick Motor Co.*,[16] it was said that the manufacturer, by putting a product on the market, assumes a responsibility to the consumer, resting not only in contract but upon the relation arising from his purchase and the possibility of harm if proper care was not used in producing the goods. Before this case, recovery in negligence cases, without privity, was not permitted in many jurisdictions. Now such an action is almost universally recognized.

Where recovery is permitted in a tort action, the basis of such action must be considered. Simple negligence is the doing of an unintentional act which violates a legal duty, causing injury to another. Willful negligence constitutes the purposeful, unlawful injury of another, or the purposeful doing of a dangerous act, or one in violation of a duty imposed by law which in all reasonable probability, to the knowledge of the wrongdoer, will result in injury to another. Simple negligence is the direct opposite of an injurious act willfully done, where the mind fully appreciates the legal duty violated. Where the mind is innocent of any purpose to injure another, or of knowledge of the fact that in all probability injury will result from the act purposely done, simple negligence results. This is true under two circumstances. First, when the duty violated is one imposed by law without relation to the breach of a representation in a voluntary transaction created by agreement between the parties, and second, where the breach is of a representation made to induce a sale of goods, said representation being honestly made but being in fact untrue, to the purchaser's damage.

The latter situation was the basis of the tort action recognized and permitted at common law when a warranty was held to be collateral to the sales agreement and the breach of the collateral representation was required to be separately pursued. The right to an action *ex delictu* for violation of the representations as to the quality of the goods, whether made collateral to or in fact as part of the contract, has since continued. Such action is not based on fault, but rather on the untruthfulness of the representations honestly and innocently made.

Williston, quoting from an early case, says that:[17]

---

[16] 217 N. Y. 382, 111 N. E. 1050 (1916).

[17] 1 Williston on Sales, 504 (par. 196), at n. 9 (rev. ed., 1948).

> ". . . In Williamson vs. Allison, 2 East, 446, 450, Lord Ellenborough said: 'The warranty is the thing which deceives the buyer who relies on it; and is thereby put off his guard. Then if the warranty be the material averment, it is sufficient to prove that broken to establish the deceit; and the form of the action can not vary the proof in that respect . . . Here then the plaintiff will be equally entitled to recover in tort upon the same proof, by striking out the whole averment of the scienter.' "

The point to be noted is that breach of the representation, which was not necessarily a promise, was an obligation imposed by law, and was the subject of a tort action by anyone rightfully relying thereon to his damage. To hold that privity is necessary under these circumstances, and not necessary where the negligence was in the selection of materials or the process of manufacture, seems inconsistent.

The representation made by a manufacturer seeking to induce the use of his product (where because of economic reasons he must sell his product through a distributor or retailer) and where such ultimate consumer relies on his representation as the inducing cause of the purchase, amounts to a warranty in favor of the ultimate consumer. Certainly the corner drug store or other retailer of ". . . Permanent Wave" could have no use for such product, nor would he be induced to buy it because of representations of the advantage to be gained by its use, except as the ultimate consumer may, in response to the manufacturer's representation, demand the product. But the . . . Home Permanent Company, in inducing through direct advertising the use of its product by the ultimate consumer, does so for its own benefit. It is only secondarily interested in the retailer as a channel through which the product is made available to the public responding to the demand which its advertising creates.

The breach of the legal duty thus assumed may be without fault but, if untrue, constitutes a tort as originally recognized in the development of the law of warranty. Therefore it should be redressed in an action for breach of warranty, just as in the action permitted in the *MacPherson* case, supra, where the tort of the manufacturer consisted of a failure to exercise due care, under the circumstances, in the use and inspection of materials.

In an ever increasing number of cases now, in order to avoid the thesis that a contractual relationship must be established between the parties (where the sale is induced directly by the manufacturer's representations), and to enforce a claim

of a breach of an express warranty brought by the ultimate consumer, a number of legal principles or fictions are employed. They may be enumerated as follows: The warranty runs with the goods; or inures to the consumer's benefit; or the buyer is a third party beneficiary; or, the goods are in sealed containers; or the retailer or middleman acts as the agent of the manufacturer; or by reason of the public offer of the manufacturer to the ultimate consumer, there is a representation of the quality of the goods and their purchase is induced by such representation, spelling out a unilateral contract between the manufacturer and the ultimate buyer.

If any one of these theories is adopted, a warranty between the manufacturer or producer and the middleman or retailer must be shown, except as to the last two theories suggested. As to the theory of a unilateral contract, Reed Dickerson, a writer on product liability, says that:[18]

> "From a policy standpoint, a direct legal connection between manufacturer and consumer is called for here as fully as in the negligence situation dealt with in MacPherson vs. Buick Motor Co.
>
> "Liability imposed on this basis can be considered, with equal appropriateness, as resting on quasi-promise or quasi-tort (quasi-deceit). It can be imposed as if the manufacturer had made a promise or representation directly to the consumer and as if the consumer had accepted the supposed promise or relied on the supposed representation. In either case, the fiction transcends the actual contract made between the manufacturer and his immediate vendee, and establishes a clean-cut legal bond directly between manufacturer and consumer. Privity of contract is no longer a consideration.
>
> "Theories of third party beneficiaries, warranties running with the goods, and consumers' purchasing agents are unsatisfactory not because they are based on fictions but because they are based on inadequate fictions. (It is not enough merely to allow the consumer crumbs from a table set for the wholesaler.) Even courts that verbally accept these approaches repudiate them in practice by ignoring the existence and nature of the implied warranties, if any, actually raised between the manufacturer and the wholesaler.
>
> "The simplest approach is to create a direct liability to the consumer without fiction or analogy. Because the situation it deals with arises normally as a result of a sale by the

---

[18] Dickerson, Products Liability And The Food Consumer, p. 104, par. 2.4, Chap. II, "Manufacturers' and Wholesalers' Responsibility to Consumers For Unwholesome Food" (1951).

manufacturer, this kind of liability is likewise appropriately, though not necessarily, incorporated into the miscegenous household of 'warranty.' The characterization of its various aspects as 'contract' or 'tort' could follow in due time without making these processes necessary steps in the generation of the obligation. Few courts have been so bold."

This view has received the approval of the Supreme Court of Ohio. In the case of *Kniess v. Armour & Co.*,[19] the principal question had to do with the right of a non-resident corporate defendant, the manufacturer of a food product, who had been joined with a resident defendant, the local distributor of the product, to have the action removed to Federal Court on the ground of diversity of citizenship. In holding that the request should have been granted, the court, in paragraphs one and two of the syllabus, said:

"1. Where a citizen of Ohio and a citizen of another state are joined as defendants, the cause should be removed to the federal courts when a separable controversy exists between the resident plaintiff and the nonresident defendant.

"2. In an action against a packer and a retailer of food for damages resulting from the sale of unwholesome food, the liability of the packer is primary and that of the retailer secondary, and under ordinary circumstances they cannot be joined as joint tort-feasors."

In defining the character of actions that could be maintained against both the retailer and the manufacturer of food, the court said:[20]

"We, therefore, must conclude that the theory upon which an action can be maintained against Burmeister as a retailer for the sale of unwholesome food can be predicated on either contract or tort, and that the adoption of Section 12760, General Code, has not changed the underlying theory of the cause of action.

"What is, however, the theory upon which a manufacturer or packer is held liable to the ultimate consumer of unwholesome food sold through a retailer? Some few courts have said that there was an implied warranty of wholesomeness and consequently there was privity of contract. Others have said that if the negligence of the manufacturer in preparing the food causes damage to the ultimate consumer, that fact could reasonably be anticipated and privity of con-

[19] 134 O. S. 432, 17 N. E. 2d 734 (1938).

[20] Ibid., 134 O. S. at p. 442.

tract is not essential. Some have allowed a recovery either upon the theory of negligence or contract, but not both. The sale most frequently has been likened to that of poisonous drugs and injurious patent medicines, where the careful compounding is demanded by public policy. See 17 A. L. R. 672; 39 A. L. R. 992; 63 A. L. R. 344; 105 A. L. R. 1502; 111 A. L. R. 1239.

"It seems to the court that of all of these theories, the one last mentioned is the most persuasive. Public policy demands that care and caution should be exacted from manufacturers of food who sell for the purposes of general disposition and sale to the general public. In other words the manufacturer or packer warrants to the public generally that the goods produced are fit for human consumption. See 42 Harvard Law Rev. 414."

The requirement of privity as the basis for an action for breach of an express warranty in the sale of personal property has become the subject of many articles and treatises in law reviews and other legal publications.[21] Only a few of many authoritative writings are cited here. Many are cited in the leading cases which depart from the requirement of privity. Paragraph 244a of *Williston on Sales, supra,*[22] which appears for the first time in the latest edition (1948), indicates the trend and provides:

"If it be granted that a subpurchaser as such is not entitled to the benefit of a warranty given to the original buyer, it yet may be asked may not the original seller by means of labels, advertisements or otherwise bind himself by a warranty to anyone who thereafter buys his goods. Certainly manufacturers often make representations to the public, which if made directly to an immediate buyer would amount to warranties. The difficulty which most courts seem to feel in allowing the subpurchaser a remedy is based on the assumption that the liability of a warrantor is contractual, and, therefore, can only run directly between a purchaser and his immediate seller. This argument does not seem impressive as an original question. A warranty is in many cases imposed by law not in accordance with the intention of the parties; and in its origin was enforced in an action sounding

---

21 1 Williston on Sales (Rev. ed., 1948) added a new Par. 244a on this point. See also, Dickerson reference above, n. 18, at Chap. II. Also, Spruill reference above, n. 13. Also, Note, Liability of the Manufacturer to the Ultimate Consumer for Breach of Warranty in Ohio, 7 West. Res. L. R. 94 (1951). Also, Green, Innocent Misrepresentations, 19 Va. L. R. 242 (1933). Also, Harper & McNeely, A Synthesis of the Law of Misrepresentation, 22 Minn. L. R. 939 (1938). Also, Miller, Liability of Manufacturer for Harm Done By Product, 3 Syracuse L. R. 106 (1952).

22 Williston, supra, n. 21.

in tort, based on the plaintiff's reliance on deceitful appearances or representations, rather than on a promise, and where forms of action are still differentiated, an action of tort is generally allowed even at the present day. It must be admitted, however, that most courts might require the existence of a direct contractual relation. This relation, however, might under some circumstances exist between manufacturer and subpurchaser and conceivably even between the manufacturer and a consumer who is neither a purchaser nor subpurchaser. A general offer like an offer of reward may be made to any who will buy; and though this does not often happen, illustrations may be found in the sale of well-known articles such as 'Holeproof' hosiery and Ingersoll watches."

A case on which defendants often rely to defeat such a theory of action is *Wood v. The General Electric Co.*[23] The plaintiff there had purchased an electric blanket, which set fire to his house after less than two months of use. The petition contained two causes of action, one for a breach of implied warranty, the other for the negligent manufacture of the blanket and failure to inspect and for failure to warn plaintiff of its dangerous condition. The court held, in the second paragraph of the syllabus:

"2. Although a subpurchaser of an inherently dangerous article may recover from its manufacturer for negligence, in the making and furnishing of the article, causing harm to the subpurchaser or his property from a latent defect therein, no action may be maintained against a manufacturer for injury, based upon implied warranty of fitness of the article so furnished."

From the statement of facts as found in the *Wood* case,[24] that case is to be distinguished from the hypothetical situation here discussed, because of the failure to allege or attempt to prove that the purchaser of the blanket was induced to buy it by the direct representations of the General Electric Company. Nor was the issue of an express warranty presented. It should also be noted that the question of implied warranty was apparently not specifically called to the attention of the reviewing court by the plaintiffs. The plaintiffs' claim of error was that the charge on contributory negligence was not confined to the cause of action based on negligence. The Ohio Supreme Court said:[25]

---

[23] 159 O. S. 273, 112 N. E. 2d 8 (1953).

[24] Ibid., at 159 O. S. p. 275.

[25] Ibid., at 159 O. S. p. 278.

> "There is another reason why the charge of the court on contributory negligence was not prejudicial to the plaintiffs as it related to the subject of implied warranty. The blanket in question was purchased in the original package from an independent dealer. To support an implied warranty there must be contractual privity between the seller and buyer."

The case of *Krupar v. Procter & Gamble Co.*,[26] is also cited, but the question of warranty was found by the court not to be an issue in that case.

The case of *Jordon v. Brouwer*,[27] often is also cited. This case was one in which it was alleged that "antifreeze," because of its dangerous chemical content, damaged the radiator of plaintiff's car. The plaintiff alleged an express warranty through advertising on the labels of the cans used by the defendant to deliver its product to the purchaser. The action was brought by the ultimate consumer (who purchased the antifreeze from a retailer), against the manufacturer. There is no doubt that the majority of the court held that the plaintiff could not maintain an action based on a claim of express or implied warranty, where privity could not be established between the parties. However, the dissenting opinion is far more persuasive under modern trends.

Of the many cases cited by modern authorities as representing the trend of the law on the subject of privity, the case of *Baxter v. Ford Motor Co.*,[28] best demonstrates this trend. The plaintiff's action was against both the dealer and manufacturer of Ford automobiles for damages sustained by shattered glass, which destroyed one of plaintiff's eyes when the windshield was struck by a pebble thrown from the road by a passing automobile. The dealer was dismissed from the case. The case against Ford was based on its published representation that the glass used in the windshield was so made that it would not fly apart or shatter under the hardest impact. The trial court dismissed the action against Ford because there was no privity of contract between Ford and the plaintiff, he having purchased the car from an independent dealer.

In the first paragraph of the headnotes of the American Law Reports, *supra*,[29] it is said:

---

[26] 160 O. S. 489, 117 N. E. 2d 7 (1954).

[27] 86 O. App. 505, 93 N. E. 2d 49 (1949).

[28] 168 Wash. 456, 12 P. 2d 409, 88 A. L. R. 521 (1932).

[29] Ibid., n. 28.

"An automobile manufacturer may, notwithstanding there was no privity of contract between them, be liable to a purchaser of a car from a dealer for injuries to such purchaser by flying glass when a pebble thrown by a passing car struck the windshield where the manufacturer in its advertising represented that the glass in the windshield was so made that it would not fly or shatter under the hardest impact."

And in the A. L. R. report[30] the court said:

"The vital principle present in the case of Mazetti vs. Armour & Co. (75 Wash. 622, 135 P. 633, 634) supra, confronts us in the case at bar. In the case cited the court recognized the right of a purchaser to a remedy against the manufacturer because of damages suffered by reason of a failure of goods to comply with the manufacturer's representations as to the existence of qualities which they did not in fact possess, when the absence of such qualities was not readily discoverable, even though there was no privity of contract between the purchaser and the manufacturer.

"Since the rule of caveat emptor was first formulated, vast changes have taken place in the economic structures of the English speaking peoples. Methods of doing business have undergone a great transition. Radio, bill-boards, and the products of the printing press have become the means of creating a large part of the demand that causes goods to depart from factories to the ultimate consumer. It would be unjust to recognize a rule that would permit manufacturers of goods to create a demand for their products by representing that they possess qualities which they, in fact, do not possess, and then, because there is no privity of contract existing between the consumer and the manufacturer, deny the consumer the right to recover if damages result from the absence of those qualities, when such absence is not readily noticeable.

" 'An exception to a rule will be declared by courts when the case is not an isolated instance, but general in its character, and the existing rule does not square with justice. Under such circumstances a court will, if free from the restraint of some statute, declare a rule that will meet the full intendment of the law.' Mazetti vs. Armour & Co., supra."

In the case of *Burr v. Sherwin-Williams Co.*,[31] the action was between a cotton planter as plaintiff (who came to use the defendant's insecticide through a cooperative association) and the manufacturer of the insecticide. It was charged that the insecticide, when sprayed on plaintiff's cotton crop, caused

---

[30] At p. 525.

[31] 42 Calif. 2d 682, 268 P. 2d 1041 (1954).

damage to the crop. Many questions were presented involving the doctrine of res ipsa loquitur, warranties under the statutes of California, disclaimer of warranty printed on labels, etc. The *court*[32] *discussed the need of privity in claiming a breach of* express or implied warranty, and said:[33]

"Another possible exception to the general rule is found in a few cases where the purchaser of a product relied on representations made by the manufacturer in labels or advertising material, and recovery from the manufacturer was allowed on the theory of express warranty without a showing of privity. (See Free v. Sluss, 87 Cal. App. 2d Supp. 933, 936-937 (197 P. 2d 854) (soap package contained printed guarantee of quality); Bahlman v. Hudson Motor Car Co., 290 Mich. 683 (288 N. W. 309, 312-313) (automobile manufacturer represented top of car to be made of seamless steel); Baxter v. Ford Motor Co., 168 Wash. 456 (12 P. 2d *409, 15 P. 2d 1118, 88 A. L. R. 521) (automobile manufac*turer represented windshield to be nonshatterable glass); Simpson v. American Oil Co., 217 N. C. 542 (8 S. E. 2d 813, 815-816) (representation on label that insecticide was nonpoisonous to humans); Prosser on Torts (1941) 688-693; 1 Williston on Sales (Rev. Ed. 1948) 648-650; Feezer, 'Manufacturer's Liability for Injuries Caused by His Product,' 37 Mich. L. Rev. 1; Jeanblanc, 'Manufacturer's Liability to Persons Other than Their Immediate Vendees,' 24 Va. L. Rev. 134 (146-155).) Neither exception is applicable here. The facts of the present case do not come within the exception relating to foodstuffs, and the other exception, where representations are made by means of labels or advertisements, is applicable only to express warranties. As we have seen, the instruction involved here dealt only with implied warranties. Accordingly, it was error for the trial court to instruct that privity was not required.

"The question of whether plaintiffs could recover because of breach of an express warranty was apparently not presented to the jury, but, since there may be a new trial, *it is appropriate to point out that the record contains sufficient* evidence to show that there were representations which could form the basis of an express warranty."

In the case of *Collum v. Pope & Talbot, Inc.*,[34] it was held that privity was unnecessary in cases involving foodstuffs and in a few cases where the buyer relied on the manufacturer's representations in advertisements or labels. And in *Worley v. Procter*

---

[32] 42 Calif. 2d at p. 695.

[33] Ibid., at p. 696.

[34] 135 Calif. App. 2d 653, 288 P. 2d 75 (1955).

& Gamble Mfg. Co.,[35] it was held that in the case of food products sold in original packages and other articles, if they were dangerous to life if defective, representations directed to the ultimate consumer by the manufacturer being inducements to the buyer must be considered as warranties implied by law. This results in imposing liability for injuries to the consumer, irrespective of any contractual obligation on the vendor.[36]

Quoting again from Spruill's leading article, *supra*:[37]

> "It has been said of warranty that 'A more notable example of legal miscegenation could hardly be cited.' It originated in tort as a species of relief for misrepresentation. Later there was added to this concept of warranty another which was consensual in nature. In time special assumpsit rather than trespass in the case for deceit became the normal remedy for breach of warranty and men came to think of warranty as contract. But the old remained along with the new. Consequently warranty is neither *tort* nor *contract. It is both.*" (Emphasis added.)

The basis of an express warranty is first a representation as to the quality of the goods, followed by reliance thereon as an inducement for entering into a sales agreement for the purchase of personal property. Where such representation is made and relied upon, an express warranty results. This is not to say that a manufacturer who does not make such public representations as to induce the sale of his product is to be held liable to the ultimate consumer without privity upon any other basis than negligence in the process of manufacture or use of materials. But an artificial rule of law of doubtful parentage should not protect one from liability, where his representations are the inducing cause of a sale in which he is undoubtedly benefited.

From the foregoing authorities it is clear that the absence of privity cannot be pleaded as a bar to liability in all cases where the ultimate consumer brings an action against the manufacturer for damages suffered in the use of his product. The basic question underlying liability is whether or not the manufacturer induced the sale of his goods by direct representations of quality which were not true, and the purchaser relied on such representations to his damage.

---

[35] 241 Mo. App. 1114, 253 S. W. 2d 532 (1953).

[36] See also, United States Pipe & Foundry Co. v. Waco, 130 Tex. 126, 108 S. W. 2d 432 (1937); and Graham v. Watts & Sons, 238 Ky. 96, 36 S. W. 2d 845 (1931).

[37] At n. 13, above, p. 552 therein.

Where a manufacturer induces the purchase of his products by an ultimate consumer by representations as to their quality, purposes and uses, which are relied on by the purchaser, and where such representations are untrue, so that the purchaser is damaged in using the product for the purpose as advertised, the common law theory of express warranty should be available to the purchaser regardless of privity. If this is not true, then where the dealer sells at the request of the buyer without express warranty (the buyer having been induced to buy through the manufacturer's representations) and the law of the case of *McMurray v. Vaughn's Seed Store,*[38] (set forth below) is in point on the facts, and the law of the case of *Wood v. General Electric Co., supra,*[39] is also in point, then even though the plaintiff was injured because the product did not square with the representations that induced the sale, he would be without a remedy if unable to prove fault in the process of manufacture under the case law of Ohio. The *McMurray* case[40] provides that:

> "4. Where a dealer sells an article of merchandise in the original package as it comes from the manufacturer, and the customer buys it knowing there has been no inspection by the dealer, there is no implied warranty, and, in the absence of an express warranty or representation, such dealer is not liable to the purchaser for damages caused by any deleterious substance in such merchandise the presence of which he had no knowledge."

Wood v. The General Electric Company, supra, says:[41]

> "2. Although a subpurchaser of an inherently dangerous article may recover from its manufacturer for negligence, in the making and furnishing of the article, causing harm to the subpurchaser or his property from a latent defect therein, no action may be maintained against a manufacturer for injury, based upon implied warranty of fitness of the article so furnished."

In our hypothetical case, the facts pleaded are that the plaintiff purchased defendant's ". . . . Home Permanent" from an independent dealer on the faith of representations published by the defendant. The defendant's product was delivered through the independent dealer in a sealed container. The representations of the defendant were made directly to the ultimate

---

[38] 117 O. S. 236, 157 N. E. 567 (1927), par. 4 of the syllabus. See below, the McMurray case quotation.

[39] N. 23, above.

[40] N. 38, above.

[41] N. 23, above, in Par. 2 of the syllabus.

consumer, that ". . . . Home Permanent" could be used, if directions were followed, in complete safety to the user. The plaintiff did follow the defendant's directions for use, with the result that she lost her hair to within one-half inch of her scalp. These facts, as pleaded, then are sufficient to state a cause of action for breach of an *express* warranty against the defendant.

Our conclusion as to implied warranty as a cause of action would follow the same logic, were it not for the strong effect of the second paragraph of the syllabus of *Wood v. The General Electric Company, supra.*[42] Because of the law there clearly determined, a breach of an implied warranty of fitness or merchantability cannot be redressed except where there is privity between the parties, which conclusion we are bound to follow.

Actually, the *Wood* case dealt with a chattel. Our hypothetical case deals with a cosmetic or personal-application product. One easily could distinguish the *Wood* case, logically speaking. But it seems far more important to develop the "actual representation" principle, and I confine myself to that point in order to avoid possible confusion of the two quite dissimilar approaches to the problem.

It is sufficient, in practical terms, to set up a rule of simple strength: that a manufacturer's advertised or label-printed representation is an actual warranty in the case of packaged, widely advertised products, at least; and that this warranty is binding if reasonably relied upon by the ultimate consumer or user.*

---

[42] At n. 41.

* [*Editor's Note:* This, in effect, is the rule laid down in the case on which the foregoing discussion is based. In that case, the author, Judge Skeel, with Kovachy, P. J. and Hurd, J., concurring, so ruled on a defendant's demurrer to the theory here discussed. Rogers v. Toni Home Permanent Co., Court of Appeals of Ohio, Cuyahoga County, 8th Distr., Opinion dated Jan. 16, 1957.

Judge Skeel kindly consented to write the foregoing discussion at the request of the Editors of this law review.]